



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

SEP 27 2004

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an asset management and medical product marketing firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 30, 1998. The proffered wage as stated on the Form ETA 750 is \$36,317 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since July of 1997.

On the petition, the petitioner stated that it was established during 1990 and that it employs three workers. In support of the petition, counsel submitted a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a loss of \$41,106 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L states that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted copies of its California Form DE-6 Quarterly Wage and Withholding Reports for the third and fourth quarters of 2001 and the first and second quarters of 2002. Those reports show that the beneficiary was the petitioner's sole employee during those quarters, and that the petitioner paid her \$5,792.74, \$6,290, \$6,440, and \$6,540 during those quarters, respectively.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 22, 2002, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center noted that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements and must demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested the petitioner's income tax returns for 1999 and 2000. The Service Center also requested the petitioner's California Form DE-6 Quarterly Wage and Withholding Reports for the previous four quarters.

In response, the petitioner submitted the requested tax returns and DE-6 forms. The DE-6 forms submitted were for the last quarter of 2001 and the first three quarters of 2002. Of those, only the report for the third quarter of 2002 had not been submitted previously. That return shows that the beneficiary was the petitioner's only employee and that the petitioner paid her \$6,540 during that quarter.

The petitioner's 1999 Form 1120 U.S. Corporation Income Tax Return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$14,049 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$45,189 and current liabilities of \$17,092, which yields net current assets of \$28,097.

The petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$23,718 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$48,732 and current liabilities of \$18,729, which yields net current assets of \$30,003.

On December 17, 2002, the California Service Center issued another request for evidence in this matter. The Service Center requested copies of the beneficiary's Form 1040 U.S. Personal Income Tax Returns for 1998, 1999, 2000, and 2001, with all schedules and attachments, including the beneficiary's Form W-2 Wage and Tax Statements. The Service Center also requested the beneficiary's three most recent pay stubs.

In response, the petitioner submitted the requested documents. The W-2 forms show that the petitioner paid the beneficiary \$5,989, \$17,567, \$25,452.50, and \$24,173.46 during 1998, 1999, 2000, and 2001, respectively. Curiously, the beneficiary does not appear to have declared the 2000 and 2001 wages from the petitioner on her income tax returns.

The petitioner also provided photocopies of checks drawn by the petitioner and payable to the beneficiary. Those checks were apparently issued twice a month and were for irregular amounts. The petitioner ostensibly paid the beneficiary \$1,006.62 twice per month during October, November, and December of 2002.

On March 27, 2003, the California Service Center issued a Notice of Intent to Deny in this matter. The Service Center observed that the petitioner's 1999, 2000, and 2001 tax returns did not show taxable income in an amount sufficient to pay the proffered wage. The petitioner was accorded 30 days to respond.

In response, the petitioner submitted a letter, dated April 14, 2003. The petitioner observed that, as shown by the W-2 forms submitted, the petitioner has been paying wages to the beneficiary during the pendency of the

petition. The petitioner also observed that a company's tax returns are not necessarily a good index of its financial strength.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 4, 2003, denied the petition.

On appeal, counsel submits a brief. Counsel states that the petitioner is a general partner in Greenleaf Orchards, Ltd., (Greenleaf), a pistachio grower, which counsel further states has a \$350,000 revolving line of credit. Counsel argues that \$35,000 of that credit line is, therefore, imputable to the petitioner. Counsel further states that the petitioner receives fees from Greenleaf in farm management fees and general administration fees. In addition, counsel states that the petitioner receives additional funds based on its 10% share of Greenleaf.

Counsel states that Greenleaf's gross income is growing. Counsel specifically states that, "2002 gross receipts or sales for Greenleaf was \$1,041,088, of which 10%, or \$104,103, is owned by Greystone." Counsel submits a variety of documents pertinent to Greenleaf Orchards, Ltd. Counsel implicitly urges that at least some portion of the petitioner's depreciation deduction should be added back into its income for the purpose of determining ability to pay the proffered wage, by stating, "the depreciation of the pistachio trees, which are (sic) shown as an expense in the tax return, does not diminish the expanding profitability of this business, or the ability of the petitioner-employer to pay the proffered wage."

The pass-through of income and expenses from a partnership to its partners is one of the petitioner's sources of income and deductions. That the petitioner's gross income, or some portion of it, exceeds the proffered wage, however, is insufficient. That income is presumably included on the petitioner's tax return and, as such, will be included in the determination of the petitioner's ability to pay the proffered wage.

The petitioner is obliged to demonstrate the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income or, in the case of a corporation, its taxable income before net operating loss deduction and special deductions.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities which will be due and are projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Counsel appears to assert that, because the petitioner owns a portion of a limited partnership, and that limited partnership has the ability to borrow, some portion of that ability to borrow is imputable to the petitioner. That assertion, if correctly understood, is questionable. This office, however, need not reach that question.

A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established, by submitting W-2 forms, that it paid the beneficiary \$5,989, \$17,567, \$25,452.50, and \$24,173.46 during 1998, 1999, 2000, and 2001, respectively. Those wages will be included in the determination of the petitioner's ability to pay the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The proffered wage is \$36,317 per year. The priority date is December 30, 1998.

During 1999, the petitioner paid the beneficiary \$17,567. The petitioner must demonstrate the ability to pay the balance of the proffered wage (\$18,758). The petitioner declared taxable income before net operating loss deduction and special deductions of \$14,049, an amount less than the balance of the proffered wage.

The petitioner had 1999 year-end net current assets of \$28,097. That amount is also less than the proffered wage. The petitioner has not demonstrated that any other funds were available during 1999 with which to pay the proffered wage. The petitioner has failed, therefore, to demonstrate the ability to pay the proffered wage during 1999.

During 2000, the petitioner paid the beneficiary \$25,452.50. The petitioner must demonstrate the ability to pay the balance of the proffered wage. The petitioner declared taxable income before net operating loss deduction and special deductions of \$23,718. Those amounts total \$48,170.59, an amount greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

During 2001, the petitioner paid the beneficiary \$24,173.46. The petitioner must show the ability to pay the proffered wage the balance of the proffered wage out of its income. The petitioner declared a loss as its taxable income before net operating loss deduction and special deductions during that year. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its income. The petitioner ended the year with negative net current assets. The petitioner has not demonstrated the ability to pay any portion of the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1999 and 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.